Editor's Note: Appealed sub nom Amax LandCo. v Babbit, Civ. No. 1-95-CV-02150 (D.D.C. Nov. 20, 1995).

MEADOWLARK, INC.

IBLA 91-323, 93-421, and 93-422 — Decided June 29, 1995

Appeals from decisions of the Minerals Management Service, disallowing deductions for black lung excise taxes. MMS-88-0347-MIN, MMS-89-0081-MIN, MMS-90-0114-MIN, MMS-92-0163-MIN, and MMS-93-0073-MIN.

Affirmed.

1. Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

   Black lung excise taxes are properly considered to be an element of the costs of mining and, as such, will not be allowed to be deducted from value for royalty computation purposes.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Meadowlark, Inc. (Meadowlark), now Amax Land Company (Amax), has appealed from a series of decisions issued by the Director, Minerals Management Service (MMS), all involving Federal coal leases W-0313773 and W-0317682. Initially, these appeals all involved Meadowlark's claim that it should be allowed to take deductions, for royalty calculation purposes, for royalty on royalty, black lung excise taxes (BLET), abandoned mine lands (AML) fees, state severance and production taxes, excess moisture, and any compounding royalty effect from the foregoing components. A summary of the issues involved in each of the decisions is set forth below.

IBLA 91-323

By letter dated October 17, 1988, MMS ordered Meadowlark to pay $67,566,347.75 in additional royalties due on Federal coal leases W-0313773 and W-0317682 for the period September 1, 1985, through August 31, 1988, because the leases were readjusted from a cents-per-ton royalty basis to a royalty rate of 12-1/2 percent of the value of the coal produced. Meadowlark paid a portion of the claimed amount, but deducted payments for royalty on royalty, BLET, AML fees, state severance and production taxes, excess moisture, and any compounding royalty effect from the foregoing components (hereinafter referred to as "Deductions"). Meadowlark appealed the demand for the outstanding amount of $26,091,107.15 to MMS, which docketed the appeal as MMS-88-0347-MIN.

By letter dated October 19, 1988, MMS denied Meadowlark's written request that it be permitted to reduce the "gross proceeds" received for Federal coal by taking the Deductions for royalty computation purposes. Meadowlark appealed this decision to MMS, which docketed the appeal as MMS-89-0081-MIN.

By letter dated January 11, 1990, MMS informed Meadowlark that MMS was claiming additional royalties due on the subject leases in the amount of $4,231,191.54 for the period September 1, 1988, through August 31, 1989, as a result of the Deductions asserted by Meadowlark. However, for the period between February 28, 1989, and August 31, 1989, MMS did not assess royalties on these reimbursements because the revised Federal coal value regulations at 30 CFR 206.257(b)(5), in effect during this time period, specifically authorized the deduction of BLET, AML fees and severance taxes from royalty value. Meadowlark appealed the demand for additional royalties in the amount of $4,231,191.54 to MMS, which docketed the appeal as MMS-90-0114-MIN.

By order dated March 1, 1991, the Director, MMS, decided the three above-referenced appeals. He denied all of Meadowlark's Deductions for the period prior to March 1, 1989. However, for the period March 1, 1989, to October 1, 1990, he granted Meadowlark's appeal of MMS' October 19, 1988, order (MMS-89-0081-MIN) with respect to certain of the Deductions. MMS partially granted Meadowlark's appeal for this period because MMS had revised its regulations to specifically allow the Deductions. Meadowlark appealed the decision of the Director, MMS, to this Board, which docketed the appeal as IBLA 91-323.

IBLA 92-79

By letter dated December 6, 1988, MMS apprised Meadowlark that MMS was claiming late payment charges on readjusted rental rates due on the subject leases in the amount of $5,527.90 for the period September 1, 1985, through November 21, 1988. Meadowlark appealed this demand to MMS, which docketed the appeal as MMS-89-0021-MIN.

By letter dated December 6, 1988, MMS assessed late payment charges against Meadowlark in the amount of $4,127,590.66 for the period September 1, 1985, through November 21, 1988. Meadowlark appealed this demand to MMS, which docketed the appeal as MMS-89-0022-MIN.

By decision dated August 21, 1991, MMS denied Meadowlark's appeals. Meadowlark's appeal from this decision was docketed by the Board as IBLA 92-79.

IBLA 92-199

By letter dated February 6, 1991, MMS informed Meadowlark that it was claiming additional royalties due on the subject leases in the amount of $3,584,428.57 for the period September 1, 1989, through August 31, 1990, as a result of the royalty on royalty and excess moisture deductions asserted

by Meadowlark. Meadowlark appealed this demand to MMS, which docketed the appeal as MMS-91-0072-MIN. By decision dated October 25, 1991, the Director of MMS upheld the assessment. Meadowlark's appeal from this decision was docketed by the Board as IBLA 92-199.

IBLA 93-421

By letter dated April 7, 1992, MMS assessed Meadowlark $3,034,963.88 in additional royalties due on coal production from lease W-317682, and $5,013,966.60 in additional royalties due on coal production from lease W-313773 for the period September 1, 1990, through August 31, 1991. Meadowlark again had claimed the above-referenced Deductions. MMS docketed Meadowlark's appeal from this assessment as MMS-92-0163-MIN. By decision dated April 21, 1993, the Director of MMS upheld the assessment. Meadowlark's appeal from this decision was docketed by the Board as IBLA 93-421.

IBLA 93-422

By letter dated November 25, 1992, MMS informed Meadowlark that it was claiming $1,898,591 in additional royalties for lease W-317682, and $4,243,225 in additional royalties for lease W-313773 for the period September 1, 1991, through August 31, 1992. MMS assessed the additional royalties because Meadowlark again claimed the Deductions. MMS docketed Meadowlark's appeal from the assessment as MMS-93-0073-MIN. By decision dated May 3, 1993, the Director of MMS upheld the assessment. This Board docketed Meadowlark's appeal from this decision as IBLA 93-422.

By order dated February 6, 1992, the Board consolidated IBLA 91-323, IBLA 92-79, and IBLA 92-199, and subsequently, by order dated July 30, 1993, the Board consolidated IBLA 93-421 and IBLA 93-422 with the previously consolidated appeals.

On March 14, 1994, Amax and counsel for MMS filed a series of "Joint Stipulations and Motions" concerning these appeals. They executed a Settlement Agreement on March 4, 1994, to be effective February 28, 1994, which embodied the following understanding:

> By Settlement Agreement executed March 4, 1994, to be effective February 28, 1994, ("Settlement Agreement"), Amax and the MMS agreed that the resolution of certain outstanding MMS claims against Amax and the associated administrative appeals with respect to the Subject Leases would be preferable to the resolution thereof through administrative or judicial proceedings. Based thereon, and for the consideration recited therein, Amax agreed to withdraw the (i) royalty on royalty, (ii) abandoned mine land fees, (iii) state severance and production tax, (iv) excess moisture, and (v) compounding royalty effects issues ("Withdrawn Issues") from the Consolidated Appeals. The parties agreed that Amax would continue to prosecute administrative

> appeals with respect to the black lung excise tax exclusion ("BLET Exclusion"). [1/] In so doing, the MMS agreed that the dismissal by Amax of the Withdrawn Issues would not be construed as an adverse admission by, nor otherwise be asserted against, Amax in the on-going prosecution of the administrative appeals
> of the BLET Exclusion.

(Joint Stipulations and Motions at 5).

Pursuant to the Settlement Agreement, Amax requested (1) that it be allowed to withdraw IBLA 92-79 and IBLA 92-199 in their entirety and that they be dismissed with prejudice; (2) and that it be allowed to withdraw the Withdrawn Issues in IBLA 91-323, IBLA 93-421, and IBLA 93-422 and that these issues be dismissed with prejudice. Amax and MMS requested that
the Board designate the BLET Exclusion as the sole remaining issue in
IBLA 91-323, IBLA 93-421, and IBLA 93-422. By order dated April 11, 1994, the Board granted these requests. 2/

Pursuant to the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1988), and 43 CFR 3451.1(a), the leases involved in these appeals were readjusted from a cents-per-ton basis to a percent of value basis effective September 1, 1985. Under section 207(a) of FCLAA, Meadowlark was required to pay a royalty of "not less than 12 1/2 per centum of the value of coal as defined by regulation." 30 U.S.C. § 207(a)

1/ BLET are imposed on coal mining operations pursuant to the Black Lung Benefits Revenue Act of 1977. This statute imposes a tax of $0.55 per ton of coal not to exceed 4.4 percent of the sale price of the coal: "There is hereby imposed on coal from mines located in the United States sold by the producer, a tax equal to the rate per ton determined under subsection (b) ($0.55)." (Emphasis added.) 26 U.S.C. § 4121(a) (1988). The statute thus makes it clear that the "producer" is responsible for paying the black lung taxes. The Act did not define producer, but a corresponding regulation issued by the Internal Revenue Service (IRS) in October 1980 defined producer as:

> "(a) Imposition of tax.–(1) In general. Section 4121(a) imposes a
> tax on coal mined at any time in this country if the coal is sold or used by the producer after March 31, 1978 * * *. For purposes of this section, the term "producer" means the person in whom is vested ownership of the coal under state law immediately after the coal is severed from the ground, without regard to the existence of any contractual arrangement for the sale or other disposition of the coal or the payment of any royalties between the producer and third parties."

Treas. Reg. § 48.4121-1(a) (1981).

2/ Further, Amax and MMS requested the Board to strike the statement
of reasons (SOR) filed by Meadowlark, to strike the Answer filed by MMS, and to establish a schedule for briefing the single outstanding issue in IBLA 91-323, IBLA 93-421, and IBLA 93-422.

(1988). It further provided that leases should be readjusted every 10 years to reflect market conditions.

Meadowlark's leases, as readjusted, include the following royalty provision: "The royalty shall be 12 1/2 percent of the value of the coal produced by strip or auger methods. * * * The value of the coal shall be determined as set forth in 43 CFR 3480" (Readjusted Leases, PART II, Sec. 2(a)). Under 43 CFR 3485.2, which was in effect on September 1, 1985, royalty was to be calculated as follows:

> (f) Where Federal royalty is calculated on a percentage basis, the value of coal for Federal royalty purposes shall be the gross value at the point of sale, normally the mine, except as provided at [§ 3485.2(h)] of this [title]. For captive operations or other than arms-length transactions, the authorized officer shall determine gross value at the point of sale.
>
> (g) The gross value shall be the unit sale or contract price times the number of units sold.

The regulations at 43 CFR 3480.0-5(17) defined "gross value" as:

> Gross value, for the purpose of royalty calculations, means the unit sale or contract price times the number of units sold, subject to the provisions at § 3485.2(g) of this title under which gross value is determined.

Under these rules, MMS was entitled to 12-1/2 percent of the price Meadowlark received for each ton of coal sold.

Meadowlark's appeals present the question of whether Meadowlark is entitled to deduct reimbursements for BLET for royalty calculation purposes. Meadowlark advances the following arguments, many of which are beyond the scope of this Board's authority to consider, as to why MMS was incorrect in denying the deductions: (1) the Black Lung Benefits Revenue Act of 1977 has preempted the character and incidents attendant to BLET, which are not a component of value received for coal produced by Amax from the subject leases (SOR at 11); (2) the terms and conditions of the subject leases contractually preclude MMS from including BLET as a component of value for royalty calculation purposes (SOR at 12); (3) the Secretary cannot contravene by regulation the specific statutory provisions of the Black Lung Benefits Revenue Act of 1977, or interpret such regulation to permit the inclusion of BLET as a component of value for calculating royalty (SOR at 14); (4) the payment of BLET by the buyer does not constitute a "reimbursement" by the buyer to the seller for "production taxes" pursuant to the definition of gross proceeds in 30 CFR 206.251 (SOR at 15); (5) BLET do not constitute "value of production" for royalty purposes because BLET are manufacturers' excise taxes, not taxes on the production of coal, and consequently are not part of the consideration or value paid by the coal purchaser to AMAX (SOR at 16).

In its answer, MMS argues that for the period after October 1, 1990, when the Department amended the regulations to remove the exclusion for reimbursed BLET, the regulations expressly provide that royalties are due on gross proceeds, which include reimbursed BLET, and that "MMS and this Board are bound to follow duly promulgated regulations of the Department of the Interior, which have the force and effect of law. Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990), and cases cited" (Answer at 11, quoting Apache Corp., 127 IBLA 125, 133 (1993)). With respect to the period prior to March 1, 1989, when the Department amended the regulations to allow for the first time the exclusion for reimbursed BLET, MMS argues that the regulations and the Board's cases clearly require that gross value, as defined at 43 CFR 3485.2(f), include reimbursements for taxes
and fees (Answer at 12). Thus, argues MMS, Meadowlark's deduction of reimbursed BLET was improper for all periods subject to these appeals.

[1] A review of the history of the Department's treatment of whether reimbursed fees and taxes should be subject to royalty demonstrates the accuracy of MMS' argument that the Department has been consistent in its approach. As explained by MMS, the Department's first value-based coal royalty regulations were promulgated in 1976, and provided in relevant part:

> (a) Where only crushing, storing, and loading are performed prior to the point of sale, the value of the coal for royalty purposes shall be the gross value at the point of sale.
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> (b) The gross value shall be the sale or contract unit price times the number of units sold.

41 FR 20261, 20271 (May 17, 1976); 30 CFR 211.63 (1979).

The 1976 regulations did not expressly provide what was included in the term "gross value." However, in a notice of proposed rulemaking on December 16, 1981, the Department proposed the following definition of the term: "Gross value, for the purpose of royalty calculations, means the unit sale or contract price times the number of units sold, subject to the procedures in 30 CFR 211.63(g) under which gross value is determined." 46 FR 61424, 61428 (Dec. 16, 1981). In the preamble to this proposed rulemaking, the Department explained the term "gross value" as used in the rules in effect since 1976:

> a. The USGS [United States Geological Survey] considered the exclusion of all Federal royalties and Federal fees from
> the calculation of gross value of the coal for royalty purposes. This proposed rulemaking does not incorporate this exclusion. The gross value is defined to be the unit sale or contract price times the number of units sold, essentially the same definition as currently implemented. The USGS solicits comment on this provision. [Emphasis added.]

46 FR at 61426. Thus, the Department clearly stated that its proposal was to continue the existing definition of "gross value," under which there was no deduction for fees and taxes.

Further, in its subsequent final rulemaking in 1982, the Department again stated explicitly that the existing regulatory term "gross value," i.e., that adopted in 1976, did not provide for a deduction for production fees and the Department decided not to amend the term:

> Many comments requested the exclusion of reimbursed and nonreimbursed Federal royalties and Federal fees when determining the gross value, for Federal royalty assessment, of the Federal recoverable coal produced. Two comments stated that the proposed method for determining gross value not only artificially inflates the price of coal but that those making the comments would pass such costs on to the consumers, whether the costs were direct or indirect. Several comments also requested exclusion of reimbursed and nonreimbursed State and local royalties and fees. The Secretary has concluded that the current method for computing royalties will be retained. [Emphasis added.]

47 FR 33154, 33158 (July 30, 1982); 30 CFR 203.200(f) and (g) (1988). The 1982 rule remained in effect until it was modified in 1989. Thus, the Department's rules from 1985 until 1989 expressly required that reimbursed taxes and fees be included in gross value for royalty calculation purposes (Answer at 14).

On January 15, 1987, MMS published a notice of proposed rulemaking in the Federal Register, the purpose of which was to "update, consolidate, and clarify existing regulations in order to provide industry and the public with a comprehensive and consistent coal valuation policy." 52 FR 1840 (Jan. 15, 1987). These proposed rules would modify the Department's longstanding practice and permit an exclusion from royalty for BLET and AML fees. 52 FR at 1844.

Proposed 30 CFR 206.251 substituted for "gross value" the analogous term "gross proceeds" and defined the term as

> the total monies and other consideration paid to a coal lessee, or monies and other consideration to which such lessee is entitled, for the disposition of coal. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as crushing, storing, mixing, loading, treatment with substances including chemicals or oil, and other preparation of the coal to the extent that the lessee is obligated to perform it at no cost to the Federal Government or Indian owner. Gross proceeds, as applied to coal includes: Payments or credits for advanced prepaid reserve payments subject to recoupment through

> reduced prices in later sales; advanced exploration or development costs that are subject to recoupment through reduced prices in later sales; take-or-pay payments; and reimbursements, including but not limited to, reimbursements for royalties, taxes or fees, [provided, however, that gross proceeds shall not include reimbursements for Federal black lung taxes, or abandoned mine lands fees authorized by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, et seq.]. Tax reimbursements are part of the gross proceeds accruing to a lessee even though the Federal or Indian royalty interest may be exempt from taxation. [Emphasis added.]

52 FR at 1849-50.

In the preamble to the proposed rules, MMS explained that it had proposed the

> language in brackets to exclude two types of reimbursements which otherwise would be included in the definition of gross proceeds, i.e.; reimbursements for Federal black lun[g] fees and reimbursements for abandoned mine lands fees authorized by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 et seq. [Emphasis added.]

52 FR at 1842. MMS further explained that it had "received several requests to exclude these fees because the Federal Government effectively could increase royalties by increasing the fees." Id. MMS specifically requested comments on these issues. 3/

In addition, MMS included in its January 15, 1987, proposed rulemaking the following provision:

> Notwithstanding any other provisions of this section, under no circumstances shall the value for royalty purposes be less than the gross proceeds accruing, or which could accrue, to the lessee, less applicable allowances determined pursuant to §§ 206.260 and 206.262.

52 FR at 1852; 30 CFR 206.259(f).

MMS explained that this provision "restates the long-standing principle that under no circumstances can the value, for royalty purposes,

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3/ MMS stated that it recognized that "similar arguments could be made about other items which are proposed to be included in the definition of gross proceeds," that the "exclusion of Federal black lung fees and abandoned mine lands fees could set a precedent for the exclusion of other items," and that the "exclusion of these two Federal fees would lead to a reduction in royalty collections." 52 FR at 1842.

be less than the gross proceeds accruing, or which could accrue, to the lessee, less applicable washing and transportation allowances." 52 FR at 1844. MMS further explained this provision:

> The definition of gross proceeds was discussed earlier with respect to § 206.251(k). It is worth noting again, however, that the gross proceeds accruing to the lessee includes all costs paid by the purchaser of the coal to (or to others on behalf of) the seller, including tax reimbursements and other reimbursements (with the exception of reimbursements for Federal black lung fees and abandoned mine land fees discussed above). This principle has been upheld in a long line of cases: Wheless Drilling Co., 80 I.D. 599, 13 IBLA 21 (1973); Amoco Production Co., 29 IBLA 234, 236 (1977); Hoover & Bracken Energies, Inc., 52 IBLA 27, 88 I.D. 7 (1981), aff'd, 723 F.2d 1388 (10th Cir. 1983); Knife River Coal Co., 29 IBLA 26 (1977); Knife River Coal Co., 43 IBLA 104, 86 I.D. 472 (1979). Thus, if the purchaser reimburses the seller or pays any costs on behalf of the seller for such items as severance taxes or income taxes, then the seller must include those reimbursed costs as part of the gross proceeds upon which the royalty value is determined. As noted earlier, this section would permit the lessee to reduce the gross proceeds by applicable allowances when determining this minimum value for royalty purposes.

52 FR at 1844.

On August 12, 1987, MMS published in the Federal Register a notice reopening the public comment period for 60 days. 52 FR at 29868. In a further notice of proposed rulemaking, MMS included a comprehensive, section-by-section set of revisions to the January 1987 proposed rulemaking. 53 FR 26942 (July 15, 1988). MMS deleted from the revised proposed definition of "gross proceeds" the bracketed language providing for the exclusion of reimbursements for BLET and AML fees. This provision appears separately in the revised proposed regulations as 30 CFR 206.257(b)(5):

> Notwithstanding any other regulations in this subpart, except for Indian leases the value of coal shall be reduced by the amounts of Federal Black Lung excise taxes and abandoned mine lands fees authorized by the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.), applicable to the coal production.

53 FR at 26960.

In the preamble to this further notice of proposed rulemaking, MMS explained that the definition of "gross proceeds" had received more comments than any other section of the proposed regulations. The exclusion

of reimbursed BLET and AML fees attracted most of the attention. See 53 FR at 26946-47. MMS stated that it had determined that the definition of gross proceeds was "not the place to address issues as to whether certain payments are royalty-bearing." Id. at 26947. Rather, it explained that
it was proposing as an option for public comment paragraph (b)(5) of section 206.257. Proposed paragraph (b)(5), quoted above, provides that the value of coal would be reduced by the amounts of reimbursements for BLET and AML fees. It is important to note that MMS recognized that, under long-established Departmental policy, but for this regulatory exclusion, such reimbursements would be included in gross proceeds and thus would be subject to royalty. MMS explained as follows:

> While it is well-established that the lessee's gross proceeds include all payments for coal production, including reimbursements received either directly or indirectly by the lessee (see, e.g., Knife River Coal Mining Co., 29 IBLA 26 (Feb. 8, 1977); Knife River Coal Mining Co.. 43 IBLA 104 (Sept. 24, 1979); and Hoover & Bracken Energies, Inc. v. DOI, 723 F.2d 1488 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984)), payments for Black Lung and AML fees are distinguishable from other types of fees or costs imposed on coal producers or on coal production because these are fees imposed by the Federal Government, the lessor. Thus, the lessor could raise its royalty revenues by imposing or increasing such fees. For this reason, MMS would like comment on whether it would be appropriate to reduce the value of coal for royalty payment purposes by the amounts the lessee must pay for such fees and, therefore, pass on to its purchaser.

53 FR at 26950-51.

On January 13, 1989, MMS published its final regulations governing
the valuation of coal for royalty purposes. 54 FR 1492. In the preamble to the final rule, MMS provided an analysis of the comments it received
on the subject of excluding the cost of BLET and AML fees from gross proceeds to arrive at the value of coal for royalty purposes. MMS concluded that BLET and AML fees "do not add to the value of the coal." 54 FR at 1512. Accordingly, MMS adopted 30 CFR 206.257(b)(5) with an effective date of March 1, 1989. 4/

Shortly after the final coal product valuation rules were published
in the Federal Register on January 13, 1989, Manuel Lujan was confirmed as Secretary of the Interior. The new Secretary was requested by some western States, Indians, and the Congress, to reconsider the exclusion of

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4/ This aspect of the rule applied only to Federal leases, with Indian leases being expressly exempted from its coverage. 54 FR at 1525; 30 CFR 206.257(b)(5) (1990). The final regulation also provided for the exclusion of state and local severance taxes.

production-related taxes, and either to suspend or rescind the rules before their March 1 effective date. He decided that the rules should go into effect as scheduled, but "committed to fully and completely review the issue over the ensuing months." 55 FR 5025 (Feb. 13, 1990.)

On August 29, 1989, Governor Garrey L. Carruthers of New Mexico formally petitioned the Secretary to "[s]uspend § 206.257(b)(5) of the Coal Product Valuation Rule." He urged that the Department "reinstate the historic formula for determining coal royalties." 55 FR at 5025-26.

On February 13, 1990, MMS announced that it had completed its review of the impact of the exclusions, as directed by the Secretary. It issued a notice of proposed rulemaking "to amend its coal product valuation regulations to remove the exclusion from royalty value for amounts representing production-related taxes and fees." 55 FR 5024 (Feb. 13, 1990). Under the proposed amendment, "Federal coal lessees no longer would be permitted to deduct or exclude the costs of Federal Black Lung excise taxes, AML fees, and State and local severance taxes from the value for royalty purposes." Id.

In the February 13, 1990, preamble, MMS reviewed the four basic assumptions in the January 13, 1989, rulemaking which influenced the decision to exclude BLET, AML fees, and severance taxes from value for Federal leases. See 55 FR 5026-28. MMS summarized its review in the following terms:

> After having considered the production and fiscal impacts, MMS has decided to propose rescinding these exclusions because: (a) Past departmental valuation practice appears to be more consistent with defining value to comprise, as a minimum, all elements of gross proceeds paid for produced coal, including production fees and taxes; (b) adverse fiscal effects are apparent with respect to the Federal and especially certain State treasuries, due to the relative loss in royalty revenues, and there may be an unexpected adverse fiscal impact on Indian revenue collections; (c) the study of the impact of the new rules, while of limited scope and duration, did not provide sufficient evidence of production increase; and (d) the proposed change would make coal valuation more consistent with royalty valuation for other leasable minerals. MMS also is proposing to remove the definition of "severance tax" in 30 CFR 206.251.

55 FR at 5028.

On August 30, 1990, MMS published its final rule amending the regulations to provide that Federal coal lessees no longer would be permitted

to deduct or exclude the costs of BLET, AML fees, and State and local severance taxes from the value of coal for royalty purposes. 55 FR 35427. MMS explained:

> The definition of "gross proceeds" in the coal valuation regulations at § 206.251 always has been defined as including all consideration accruing to the lessee, including reimbursement for production taxes and fees. Therefore, the exclusion that was adopted in § 206.257(b)(5) was an aberration from the fundamental standard that the value of production cannot be less than gross proceeds. While MMS recognizes that coal is different from oil and gas, and that coal is marketed differently, it nonetheless does not change the fundamental economic notion that the minimum "value" of the coal resource owned by the people of the United States is what the purchaser actually paid for that coal. [Emphasis added.]

55 FR at 35432. MMS concluded that "it should return to the historic basis of valuing production to be at least equal to the gross proceeds accruing to the lessee in payments for the produced coal." Id. at 35433.

We have undertaken this review in response to Meadowlark's argument that the Department has been historically inconsistent in its approach to exclusions for reimbursements of BLET in calculating royalty. This review demonstrates the contrary. The only period when the Department has allowed the deduction for BLET and AML fees was from March 1, 1989, to October 1, 1990, when the regulations were amended to specifically provide for it. As noted, MMS characterized this period as an "aberration from the fundamental standard that the value of production cannot be less than gross proceeds." 55 FR at 35432.

The Board's decisions have consistently held that reimbursed taxes and fees should be included in value in calculating royalty, and although it adopted regulations to specifically allow an exclusion for reimbursed BLET and AML fees, MMS recognized that it was contrary to a "long line of cases." 52 FR at 1844. 5/

5/ See Wheless Drilling Co., 80 I.D. 599, 13 IBLA 21 (1973); Amoco Production Co., 29 IBLA 234, 236 (1977); Hoover & Bracken Energies, Inc., 52 IBLA 27, 88 I.D. 7 (1981), aff'd, 723 F.2d 1388 (10th Cir. 1983); Knife River Coal Co., 29 IBLA 26 (1977); Knife River Coal Co., 43 IBLA 104, 86 I.D. 472 (1979).

Moreover, it is well established that royalties are due on tax reimbursements made by the buyer of gas produced from Federal wells. See FMP Operating Co., 121 IBLA 328, 332 (1991); BWAB, Inc., 121 IBLA 188, 191-92 (1991); CIG Exploration, Inc., 113 IBLA 99 (1990); appeal filed, CIG Exploration, Inc. v. Lujan, No. H-90-1564 (S.D. Tex. May 11, 1990); Enron

The Board applied the rule that gross proceeds includes reimbursements for BLET most recently in Black Butte Coal Co., 103 IBLA 145, 95 I.D. 89 (1988), in which the appellant argued that it should be allowed deductions for reclamation fees and BLET on the basis that under the terms of its lease such fees and taxes are not specifically allocable to the mining phase. The appellant argued that "inasmuch as the amount of the reclamation fees, taxes, and overriding royalty may be dependent upon costs associated with the transportation and processing, such costs are properly allocable to general overhead rather than to mining" (emphasis in original). 103 IBLA at 156, 95 I.D. at 95. The Board's reasoning disposes of Meadowlark's argument that BLET are "imposed upon the transaction of sale, not upon 'coal production' or upon the mining or production cycle" (SOR at 16):

> Appellant has confused the question of whether costs are directly attributable to a specific phase with the issue of how they are computed. The obligation to pay the reclamation fee and the black lung tax arises solely from appellant's mining of the coal. Or, to utilize appellant's terminology, the expenditure is directly "caused" by the mining phase. This is readily apparent if one assumes that, rather than transport and process the coal, appellant sold the freshly mined coal at the mine mouth to a third party. In such a situation appellant, as the operator, would be totally liable for the reclamation fee and the black lung tax. The individual who purchased the unprocessed coal would be assessed no costs therefor. Clearly, therefore, the costs of these assessments arise not from the general operations but from the specific act of mining. In this regard, the precedents are well-settled: production, severance taxes, reclamation fees and the like are properly considered to be a cost of production and may not be subtracted from the gross value for Federal royalty computation purposes. See Peabody Coal Co., 72 IBLA 337 (1983); Knife River Mining Co., 43 IBLA 104, 86 I.D. 472 (1979). Accordingly, we must reject appellant's assertion that it should be permitted to deduct any amounts for reclamation

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fn. 5 (continued)
Corp., 106 IBLA 394 (1989), aff'd, Enron Oil & Gas Co. v. Lujan, 978 F.2d 212 (5th Cir. 1992), cert. denied, 114 S.Ct. 59 (Oct. 4, 1993); Tricentrol United States, Inc., 105 IBLA 392 (1988); Amoco Production Co., 29 IBLA 234 (1977); Wheless Drilling Co., 13 IBLA 21, 80 I.D. 599 (1973); see also Hoover & Bracken Energies, Inc., 52 IBLA 27, 88 I.D. 7 (1981), aff'd, Hoover & Bracken Energies, Inc. v. U.S. Department of the Interior, 723 F.2d 1488 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984).

> fees, black lung tax, or the Wyoming severance and county ad valorem taxes. [Footnote omitted; emphasis in original.]

103 IBLA at 157, 95 I.D. at 95-96. 6/

Thus, we conclude that MMS correctly denied the deductions claimed by Meadowlark for BLET involved in these appeals.

To the extent not specifically addressed herein, Meadowlark's arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

_____
James L. Byrnes
Chief Administrative Judge

I concur:

_____
Will A. Irwin
Administrative Judge

_____

6/ MMS points out that Meadowlark billed its purchaser for its costs for the tax. Meadowlark states that "[i]n accordance with IRS Reg. § 4216(a)-2, Amax [Meadowlark] has reflected the black lung excise tax as a separate line item in the billings to its long term coal purchasers and on its invoices for the sale of spot coal" (SOR at 40). We agree with MMS that "the reimbursed black lung taxes were part of the price the producer paid for the coal," and that "since reimbursements for black lung taxes are part of gross proceeds, it is clear that Meadowlark must pay royalties on its reimbursed black lung taxes" (Answer at 10).